

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PATRICIA SHAW

Claimant

VS.

ORSCHELN FARM-HOME SUPPLY

Respondent

AND

TRAVELERS INSURANCE CO.

Insurance Carrier

Docket No. **202,218**

ORDER

Claimant requested review of the September 10, 2008 Post-Award Medical Award by Administrative Law Judge Bruce E. Moore. This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for the claimant. Ali N. Marchant of Wichita, Kansas appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the post award record and adopted the stipulations listed in the Award.

ISSUES

This is a post-award proceeding for additional medical treatment. The Administrative Law (ALJ) ordered respondent to provide home health care for claimant's personal hygiene needs such as showering, dressing and applying lotion to the dry skin on her legs.

The ALJ denied claimant's request for housekeeping, laundry, transportation for errands and shopping or companionship finding those are not medical treatment.

Claimant requests review and argues her need for housekeeping, laundry, transportation for errands and shopping qualify as medical treatment under the facts of this case.

Respondent argues that the ALJ erred in finding that claimant's need for health care assistance with personal hygiene activities including showering, toileting and applying lotion to her skin are medical treatment and therefore should be reversed. Respondent further argues that the ALJ's Post-Award Medical Award should otherwise be affirmed.

The issue for Board determination is whether the home care ordered by the authorized treating physician fits the definition of medical treatment as contemplated by the Kansas Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact that are detailed, accurate and supported by the record. It is not necessary to repeat those findings herein. The Board adopts the ALJ's findings of fact as its own as if specifically set forth herein except as hereinafter noted.

Briefly stated, as a result of her injuries and despite multiple surgeries, claimant remains severely limited. She has been left with chronic spasticity secondary to her cervical spine injury and suffers from profound weakness in all of her extremities. She can ambulate, but with a spastic gait and poor balance, resulting in a propensity to fall. As a result of her work-related accidental injuries the claimant suffers from residual quadriparesis or weakness in both of her upper and lower extremities. Although she lives by herself and remains independent, claimant's condition continues to deteriorate. She walks with a cane and uses a walker to get out of bed or when using the toilet. Because of the weakness in her arms she cannot use them very long. When performing activities, such as doing her laundry, she can only proceed very slowly with frequent breaks to rest.

Claimant continues to have problems walking and when walking in her house she not only uses a cane but always tries to have a hand on the wall or the furniture to prevent her from falling. She has begun to have problems combing her hair and opening bottles. She prepares her own meals which consist mainly of frozen food she can heat in the microwave. As previously noted, claimant only performs any physical activity for a short period of time before she must stop and rest.

Claimant testified that she needs help showering because she has experienced difficulty getting out of the shower. She further testified that she needs help shopping for groceries because after shopping she simply does not have the strength to carry the items from the store or from her car to her house. She also requested aid doing her laundry and applying lotion to her dry skin as well as combing her hair. Finally, claimant noted she is no longer able to perform basic housecleaning activities.

The claimant wants to remain independent and live at her home and so she has refused a wheelchair although she admits she should probably use one and she agreed that Dr. Abay had recommended home health care in the past but until now she did not feel she needed assistance.

Dr. Eustaquio O. Abay II, board certified in neurosurgery, testified that claimant needed help with housekeeping and activities of daily living. And the doctor opined that such assistance constituted medical care. The doctor testified:

Q. Is there any kind of clean demarcation in the medical field between what is medical care and what is maid service, for example?

A. Well, unfortunately, there can be a gray area there, but if it's related to a medical condition, then in general, it's still part of medical care.¹

Dr. Abay further agreed that cleaning, such as in the bathroom, are important to maintain health and sanitation. Dr. Abay opined that there were enough medical reasons for claimant to require help with her daily living requirements and housekeeping. Dr. Abay recommended that claimant have help with housekeeping and personal hygiene care.

Micha Schmidt, registered nurse, is the nursing supervisor for Right At Home, an in-home care and assistance facility. Right At Home provides assistance that is either medical or non-medical. The medical assistance requires a certified nurse's aide. Ms. Schmidt met with claimant in her home to assess her home health care needs. Ms. Schmidt opined claimant had a lot of disability but she exhibited a strong desire to remain as independent as possible. Ms. Schmidt concluded claimant needed standby help with showering, dressing and help applying lotion to the dry skin on her legs as well as incontinence care. Ms. Schmidt also noted that claimant needed care with shopping, housekeeping, companionship, protection from falls and transportation for shopping. Ms. Schmidt opined that some of the proposed care would qualify as medical assistance and some care would not. She testified:

Q. Can you give me some examples of things that would be non-medical hands-off things?

¹ Abay Depo. at 6.

A. Yes. If someone were just wanting cooking, cleaning, someone to drive their loved one around for appointments or shopping, a sitter. Those kinds of activities.

Q. And what kind of activities generally are required of a licensed CNA person to do them?

A. If toileting is required, bathing, transferring. Those kinds of hands-on activities are a certified nurse aide and are considered medical.²

Ms. Schmidt agreed that if the services she identified in her plan were not provided to the claimant the alternative could potentially be some kind of long-term nursing care. And Ms. Schmidt agreed that if a bathroom, kitchen or room was not kept clean it could have an adverse impact on claimant as the lack of sanitation could pose a danger to her health.

The Workers Compensation Act requires respondent to provide an injured worker such medical treatment as may be reasonably necessary to cure and relieve the injured worker from the effects of his injury.

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.³

In a request for post-award medical treatment, the claimant has the burden to prove her right to an award of compensation and prove the various conditions on which her right depends.⁴ In a post-award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the natural and probable consequences of the original accidental injury which was the subject of the underlying award.⁵

K.S.A. 44-510(a) placed the duty on the employer to provide medical treatment, "as may be reasonably necessary to cure and relieve the employee from the effects of the injury."⁶ Medical services are described in K.S.A. 44-510(a) as follows: "the services of

² Schmidt Depo. at 6.

³ K.S.A. 44-510(a). This was the statute in effect on the date of claimant's accident.

⁴ K.S.A. 44-501(a) (1993).

⁵ K.S.A. 2007 Supp. 44-510k(a).

⁶ See K.S.A. 44-510(a).

a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation . . .” Additionally, K.A.R. 51-9-2 defines apparatus as, “glasses, teeth, or artificial member.” Also, K.A.R. 51-9-11 establishes the criteria for reimbursement of expenses for transportation to obtain medical treatment.

The Kansas Court of Appeals, in *Hedrick*,⁷ noted the term “medical treatment” was not defined by the legislature. In *Vann*,⁸ the Board determined that K.S.A. 44-510(a) does not include cleaning services for the home under the definition of “medical treatment.”

The ALJ determined that in this case the home health care plan included both medical and non-medical care. The ALJ determined that housekeeping, laundry, transportation on errands, shopping and companionship did not constitute medical treatment. But the ALJ further determined that assisting claimant with her shower and toileting are within the scope of the term medical treatment. Consequently, the ALJ ordered the respondent to provide home health care as recommended by Dr. Abay but limited caring for claimant’s medical needs identified as claimant’s personal hygiene care, such as showering, toileting and applying lotion to her dry skin.

The Board agrees that assistance with claimant’s personal hygiene needs constitute medical treatment and affirms the ALJ’s determination in that respect. Moreover, transportation, if necessary, to medical treatment and to obtain necessary medications should also be included in the revised plan to assist claimant.

Claimant has exhibited an admirable effort and willingness to remain independent despite her increasingly daunting physical difficulties. An effort to assist her in that goal might be achieved by modifications to the shower and toilet to make them more handicap accessible which would lessen the time needed for nursing assistance. And her concerns about falling could be addressed with a medical alert system. Instead, the respondent’s outright opposition to provide any of the requested assistance to claimant appears penny wise and pound foolish. As Ms. Schmidt indicated, if claimant does not receive the assistance requested the alternative likely will be placing claimant in a nursing home.

AWARD

WHEREFORE, it is the decision of the Board that the Post-Award Medical Award of Administrative Law Judge Bruce E. Moore dated September 10, 2008, is modified to include transportation of claimant, if necessary, to medical appointments and pharmacies and affirmed in all other respects.

⁷ *Hedrick v. U.S.D. No. 259*, 23 Kan. App 2d 783, 935 P.2d 1083 (1997).

⁸ *Vann v. State of Kansas*, No. 189,857, 2000 WL 1277581 (Kan. WCAB Aug. 31, 2000).

IT IS SO ORDERED.

Dated this _____ day of January 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned Board members agree with the majority's determination that providing home health assistance with claimant's personal hygiene, i.e. showering, toileting and applying lotion to the dry skin on her legs, constitutes medical treatment. However, based upon the unique facts of this case, we respectfully dissent from the determination that the housekeeping, laundry, transportation on errands and shopping do not constitute medical treatment in this instance.

Dr. Abay testified that claimant needed help with housekeeping and activities of daily living. And the doctor opined that such assistance constituted medical care. Claimant's medical condition prevents her from performing those identified activities.

Simply stated, and as noted by Ms. Schmidt, if claimant does not receive housekeeping and laundry assistance then lack of sanitation becomes a potential danger to her health. If maintaining personal hygiene, such as assistance showering and toileting are medical treatment, surely maintaining personal hygiene by cleaning the bathroom, is no less medical treatment especially where claimant is physically unable to accomplish that task on her own. Likewise, if claimant cannot get her groceries into the house her health is compromised by the inability to receive sustenance.

Obviously, the context in which the services are provided is significant to any determination of what constitutes medical treatment. The Kansas Court of Appeals has

held that what may not constitute medical treatment in one context, may in another. For example in *Hedrick*⁹, the Court of Appeals held that a personal motor vehicle was not medical treatment in the context of that claim, but expressly noted that if claimant's injury had resulted in paraplegia its holding might have been different. Accordingly, the determination of whether services constitute medical treatment is, at times, a case-by-case factual determination.

In this case it is undisputed that claimant is physically unable to perform many basic activities of daily living as a result of her work-related injury. And her inability to perform those activities ultimately compromises her health. Under such circumstances providing assistance with those activities clearly meets the statutory requirement to relieve claimant from the effects of her injury. Accordingly, we would order respondent to provide all the services identified in Ms. Schmidt's plan.

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

⁹ *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 935 P.2d 1083 (1997).